IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.5149 OF 2005

M/s.Nitin Industries & Ors. : Petitioners
(Orig.Defendants)

V/s.

R.J.Shah & Company Ltd. : Respondent
(Orig.Plaintiff)

...

Mr.Suresh Gole for the petitioners.

Mr.A.K.Abhyankar i/b. M/s.Kirit Damania & Co., for the respondent.

...

CORAM : S.A. BOBDE, J.

August 8, 2005.

P.C.:

1. Rule, returnable forthwith.

Mr.Abhyankar appears and waives service of rule on behalf of the respondent.

Heard by consent.

2. The petitioners have challenged the order of the Appellate Bench of the Court of Small Causes at Bombay upholding the finding of the trial Court refusing to set aside the decree dated 6.3.2004 passed against the

petitioners.

3. Mr.Gole, the learned counsel for the petitioners, submitted that the decree ought to have been set aside in view of the fact that the petitioners, who are the partnership firm and partners of the firm, respectively, were not properly served.

4. Having heard the learned counsel for both the sides, I find that there is no merit in this petition.

5. The suit summons for the partnership firm was served on one Ramvilas Chawan. In addition, the petitioner nos.2 and 3, who are Partners of the firm, were served by substituted service under Order 5 Rule 20 by pasting and by registered A/D. Service by post, in addition to pasting, was done in pursuance of an order of the trial Court. The postal article containing the summons which was sent by registered post A/D. to the petitioner nos.2 and 3 was returned back with the endorsement "not claimed". In relation to the petitioner no.1 firm, the pasting of the summons was done on 11.7.2000 on a conspicuous part of the premises from where the partnership firm carried on business. Admittedly, it was not posted on a conspicuous part of the Court house. As

regards the service on the firm to one Mr.Ramvilas Chawan, who was an employee of the firm, Mr.Gole, the learned counsel for the petitioners, contended that he was not a person who was having control and management of the partnership business and, therefore, service could not have been treated as proper service. This argument is not based on any evidence led before the trial Court, except a bare statement. In fact, admittedly, the affidavit of the said Ramvilas Chawhan is also not on record.

6. In my view, the endorsement on the registered post A/D. that the summons was not claimed is itself liable to be treated as good service.

7. The next contention of the learned counsel for the petitioners is that there is an irregularity in service in view of the fact that the summons was not pasted on the Court house. There is no merit in this contention in view of the second proviso to Order 9 Rule 13 which reads as follows:-

> "Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if

> it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff’s claim."

8. The trial Court and the appellate Court have found that the petitioner no.3’s statement in his affidavit dated 1.4.2003 that he accidentally came to know about the pendency of this proceeding is false, in view of his earlier affidavit-in-support in Misc. Notice no.252 of 2003 in this suit itself in which he has stated as follows:-

> "I say that during the talks of settlement, the Plaintiffs disclosed to have filed eviction suit in this Court (sic) who further stated that if the matter was settled they could not proceed with and withdraw the said eviction suit."

There is no reason to disbelieve the statement, particularly in view of the fact that the petitioner no.2 was a Director in the respondent-company. Apart from the fact that the above statement shows that the petitioner no.3 was aware of the pending suit, the appellate Court

has observed that the petitioner no.3 has made a false statement that he accidentally came to know about it later. The matter does not call for any interference from this Court. There is no dispute that a decree has been executed and the possession has been obtained by the respondent on 17.3.2005. There is no material irregularity in the impugned order for the exercise of the discretionary power of this Court under Article 226 of the Constitution.

9. The petition is, accordingly, dismissed. The rule stands discharged.

Sd/-

S.A. BOBDE, J.